



Billing Code: 8025-01

SMALL BUSINESS ADMINISTRATION

13 CFR Part 127

RIN: 3245-AG55

Women-Owned Small Business Federal Contract Program

AGENCY: U.S. Small Business Administration

ACTION: Interim final rule.

SUMMARY: The U.S. Small Business Administration (SBA) is amending its regulations to implement Section 1697 of the National Defense Authorization Act for Fiscal Year 2013 (NDAA). Section 1697 of the NDAA removed the statutory limitation on the dollar amount of a contract that women-owned small businesses can compete for under the Women-Owned Small Business (WOSB) Program. As a result, contracting officers may now set-aside contracts under the WOSB Program at any dollar level, as long as the other requirements for a set-aside under the program are met.

DATES: Effective Date: This rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

APPLICABILITY DATE: This rule applies to all solicitations issued on or after the effective date.

Comment Date: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN 3245-AG55 by any of the following methods:

- Federal Rulemaking Portal: <http://www.regulations.gov> and follow the instructions for submitting comments.
- Mail, for paper, disk, or CD-ROM submissions: LeAnn Delaney, Assistant Director, Office of Contract Assistance, 409 Third Street, SW., Washington, DC 20416.
- Hand Delivery/Courier: LeAnn Delaney, Assistant Director, Office of Contract Assistance.

SBA will post all comments on <http://www.Regulations.gov>. If you wish to submit confidential business information (CBI) as defined in the User Notice at <http://www.Regulations.gov>, please submit the information to LeAnn Delaney and highlight the information that you consider to be CBI and explain why you believe this information should be held confidential. SBA will review the information and make a final determination of whether the information will be published or not.

FOR FURTHER INFORMATION CONTACT: LeAnn Delaney, Assistant Director, Office of Contract Assistance, at (202) 205-6460 or by e-mail at wosb@sba.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The Women-Owned Small Business (WOSB) Program, set forth in section 8(m) of the Small Business Act, 15 U.S.C. 637(m), authorizes Federal contracting officers to restrict competition to eligible Women-Owned Small Businesses (WOSBs) or Economically Disadvantaged Women-Owned Small Business (EDWOSBs) for Federal contracts in certain industries. Section 8(m) of the Small Business Act (Act) sets forth certain criteria for the WOSB Program, including the eligibility and contract requirements for the program. For example, the Act had stated that contracting officers

could only set-aside a requirement under the program if the anticipated award price of the contract did not exceed \$5 million in the case of manufacturing contracts and \$3 million in the case of all other contracts. Recently, SBA had amended its regulations to adjust these statutory thresholds for inflation so that the anticipated award price of the contract awarded under the WOSB Program must not exceed \$6.5 million in the case of manufacturing contracts and \$4 million in the case of all other contracts. See 77 FR 1861 (Jan. 12, 2012).

Even with this adjustment for inflation, these dollar value restrictions on awards under the program limited a contracting officer's ability to set-aside contracts for WOSBs or EDWOSBs. As a result, Section 1697 of the National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239, amended the Small Business Act and removed these dollar value limitations. As a result, contracting officers may now set-aside any contract for EDWOSBs or WOSBS under the program if: (1) there is a reasonable expectation that, in industries in which WOSBs are underrepresented, two or more EDWOSBs will submit offers for the contract or, in industries where WOSBs are substantially underrepresented, two or more WOSBs will submit offers for the contract; and (2) in the estimation of the contracting officer, the contract can be awarded at a fair and reasonable price. The anticipated contract can be for any dollar amount.

II. Section-By-Section Analysis

In order to implement this statutory change, SBA is amending § 127.503(a)(2) and § 127.503(b)(2) by removing the anticipated contract dollar thresholds for determining when the contracting officer may set-aside a requirement for WOSBs or

EDWOSBs. Therefore, the regulation now contains no limitation on the anticipated award price for a WOSB or EDWOSB set-aside.

III. Justification for Publication as an Interim Final Rule

In general, SBA publishes a rule for public comment before issuing a final rule in accordance with the Administrative Procedures Act (APA) and SBA regulations. 5 U.S.C. 553 and 13 CFR 101.108. The APA provides an exception to this standard rulemaking process where an agency finds good cause to adopt a rule without prior public participation. 5 U.S.C. 553(b)(3)(B). The good cause requirement is satisfied when prior public participation is impracticable, unnecessary, or contrary to the public interest. Under such circumstances, an agency may publish an interim final rule without soliciting public comment.

First, SBA believes that Section 1697 of the NDAA is effective immediately; the section does not require SBA to issue regulations in order to implement the provisions. However, SBA must remove the limitations in its regulations or they would be inconsistent with the statute, and lead to confusion among the public and other federal agencies. Since SBA is merely conforming its regulations to the statute without interpretation or policy changes, the Agency does not believe that it is necessary to issue the rule as a proposed rule.

Second, according to the Small Business Goaling Report for Fiscal Year 2011, the Federal government awarded only 3.97% of its contracts to WOSBs. See http://www.fpdsng.com/fpdsng_cms/index.php/reports. This is short of the statutory 5% goal for WOSBs. The purpose of the WOSB Program is to assist agencies in achieving the statutorily mandated 5% government-wide goal for procurement from women-owned

small businesses. By removing the limitations on the dollar amount of a contract award that can be set-aside for WOSBs or EDWOSBs in the regulations, the SBA will be clarifying that there are more contracting opportunities for WOSBs, which should result in more contracts being awarded to this group of small businesses. Consequently, the SBA believes it is necessary to implement this rule as quickly as possible.

Finally, we note that the public will still have the opportunity to offer comments on this rule, which will be reviewed by the SBA. Accordingly, SBA finds that good cause exists to publish this rule as an interim final rule as quickly as possible.

IV. Justification for Immediate Effective Date of Interim Final Rule

The APA requires that “publication or service of a substantive rule shall be made not less than 30 days before its effective date, except * * * as otherwise provided by the agency for good cause found and published with the rule.” 5 U.S.C. 553(d)(3). SBA finds that good cause exists to make this final rule effective the same day it is published in the Federal Register.

The purpose of the APA provision is to provide interested and affected members of the public sufficient time to adjust their behavior before the rule takes effect. For the reasons set forth above in Section III, “Justification for Publication as Interim Final Rule”, SBA finds that good cause exists for making this interim final rule effective immediately, instead of observing the 30-day period between publication and effective date. Nonetheless, the public may provide comments to SBA by the deadline for comments. SBA will review any comments received.

V. Compliance with Executive Orders 12866, 12988, 13132, and the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601-612)

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this rule does constitute a significant regulatory action under E.O. 12866; however this is not a major rule under the Congressional Review Act (CRA), 5 U.S.C. 800. Accordingly, the next section contains SBA's Regulatory Impact Analysis.

Regulatory Impact Analysis

1. Is there a need for the regulatory action?

This regulatory action amends regulations that implement Section 1697 of the NDAA. These amendments are necessary because without such amendments the SBA's WOSB Program rule will conflict with the statute. Such conflict and inconsistency causes confusion to members of the procurement community, including small businesses, and could limit the number of contracts available to WOSBs and EDWOSBs under the program.

2. What are the potential benefits and costs of this regulatory action?

The benefits of this rule are that there will not be a conflict between the SBA's rules and the statute, and more contracts should be available for WOSBs and EDWOSBs under the program.

3. What are the alternatives to this final rule?

SBA does not believe there are any alternatives other than to implement the statute, as enacted.

Executive Order 12988

This action meets applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

Executive Order 13132

For the purpose of Executive Order 13132, SBA has determined that the interim final rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore SBA has determined that this interim final rule has no federalism implications warranting the preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C., Ch. 35

For the purpose of the Paperwork Reduction Act, 44 U.S.C., Chapter 35, SBA has determined that this rule does not impose additional reporting or recordkeeping requirements.

Regulatory Flexibility Act (RFA), 5 U.S.C., 601-612

Because this rule is an interim final rule, there is no requirement for SBA to prepare an Initial Regulatory Flexibility Act analysis. The RFA requires administrative agencies to consider the effect of their actions on small entities, small non-profit businesses, and small local governments. Pursuant to the RFA, when an agency issues a rule the agency must prepare analysis that describes whether the impact of the rule will have a significant economic impact on a substantial number of small entities. However, the RFA requires such analysis only where notice and comment rulemaking is required but as discussed above, SBA has determined that there is good cause to publish this interim final rule without the need for public notice and comment.

List of Subjects in 13 CFR Part 127

Administrative practice and procedure, Government procurement, Reporting and recordkeeping requirements, Small businesses.

For the reasons stated in the preamble, SBA amends 13 CFR Part 127 as follows:

PART 127-WOMEN-OWNED SMALL BUSINESS FEDERAL CONTRACT
PROGRAM

1. The authority citation for part 127 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 637(m), and 644.

2. Amend § 127.503 by revising paragraphs (a)(1), (a)(2), (b)(1) and (b)(2) to read as follows:

§ 127.503 When is a contracting officer authorized to restrict competition under this part?

(a) * * *

(1) Two or more EDWOSBs will submit offers for the contract; and

(2) Contract award may be made at a fair and reasonable price.

(b) * * *

(1) Two or more WOSBs will submit offers (this includes EDWOSBs, which are also WOSBs); and

(2) Contract award may be made at a fair and reasonable price.

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Karen G. Mills,

Administrator.

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